FILE COPY

No. 70-45

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA, APPELLANT

v.

DANIEL B. BREWSTER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES ON REARGUMENT

ERWIN N. GRISWOLD,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
JEROME M. FEIT,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Jurisdiction	1
The offense is complete when the bribe is solicited or received with the requisite intent; No proof that official action was or was not taken is required	3
The statutory history	8
Conclusion	12

CITATIONS

Cases:	
Bartop v. United States, 202 U.S. 344	7, 8
United States v. Johnson, 383 U.S. 169	7, 8
United States v. Manton, 107 F. 2d 834	5
Constitution and statutes:	
Constitution of the United States, Art. I, Sec. 6, Speech or Debate Clause	2, 3, 4, 5, 6
Act of February 26, 1853, c. 81, 10 Stat. 170, Sec. 6	8
Act of October 23, 1962, P.L. 87-849, 76 Stat. 1119	11
Criminal Code (Act of March 4, 1909, c. 321, 35 Stat. 1088), Sec. 110	10
Revised Statutes (1878 ed.):	
Sec. 5450	9, 10
Sec. 5500	9, 10
18 U.S.C.:	
Sec. 201	11
Sec. 201 (c)	3, 4
Sec. 201 (g)	3, 4
Secs. 201-213 (1958 ed., Supp. V)	11
Sec. 205 (1958 ed., Supp. V)	11
Sec. 205	11
Miscellaneous:	
Association of the Bar of the City of New York, Conflict of Interest and Federal Service (1960)	11
Federal Conflict of Interest Legislation, Staff Report to Subcommittee No. 5, House Committee on the Judiciary, 85th Cong. 2d Sess., dated March 1, 1958	11
H. Rep. No. 748, 87th Congress, 1st session	11
S. Rep. No. 2213, 87th Congress, 2d Sess.	11

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-45

UNITED STATES OF AMERICA, APPELLANT

v.

DANIEL B. BREWSTER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES ON REARGUMENT

I

JURISDICTION

In his Supplemental Brief, the appellee contends that the decision below "amounted to a summary judgment on the merits" (Br. 3), and that it "'was in reality an acquittal * * *'" (Br. 12). This contention rests largely on a memorandum which is not in the record before this Court, and which appellate counsel for the government had not heard of prior to the appellee's oral argument in this Court.

It is clear, of course, that the appellee was not "in jeopardy" before the district court. No jury had been empanelled; no trial had been commenced before the

judge. There is nothing to indicate that the defendant was present. The only proceeding in the district court was to hear and determine the defendant's Motion to Dismiss (App. 8), which, with respect to the odd-numbered counts of the indictment (the only ones relating to defendant Brewster), asserted that the defendant was charged with being influenced in, or because of, "official acts in his capacity as a United States Senator," and that each count "violates the provision of Article I, Section 6 of the United States Constitution."

This Motion to Dismiss presented no issue of fact for the judge's determination. It raised only a question of law. As the court's order recites (App. 34), "This matter having come before the Court for a hearing on the defendant's motion to dismiss the indictment," it was "Ordered that the defendant's motion be granted, and the indictment be and hereby is dismissed." There is a reference to the "reasons stated orally by the Court." When those reasons are examined, however, their substance is that: "It is the opinion of this Court that the immunity under the Speech and Debate Clause of the Constitution * * * shields Senator Brewster, constitutionally shields him from any prosecution for alleged bribery to perform a legislative act" (App. 33).

This is not a factual decision, or a summary judgment, or an acquittal (in a trial which had not begun). It is a decision on a motion to dismiss, based on a determination of constitutional law, as applied to the language of the indictment. In the circumstances before the district court, the "confidential memorandum"

was in the nature of an informal bill of particulars. It may have put some flesh on the allegations of the indictment, but it did not alter those allegations—no contention is now made that it did. The decision of the district court was not that the *facts* did not support the *allegations* in the indictment; the decision was that the *allegations* did not charge an offense because of the Speech or Debate Clause. The critical legal issue was contained within the four corners of the indictment and the terms of the indictment provided the grounds of the court's dismissal. That is a decision of law, dismissing an indictment on the ground that the statute under which it is brought is unconstitutional as applied to the facts alleged. It is also the granting of a motion in bar, since the Speech or Debate Clause is used "like a pardon or the statute of limitations in another context" to bar a prosecution which otherwise would be plainly covered by the statute. On either basis there is jurisdiction in this Court to review the decision under the pre-1971 version of the Criminal Appeals Act.

II

THE OFFENSE IS COMPLETE WHEN THE BRIBE IS SOLICITED OR RECEIVED WITH THE REQUISITE INTENT; A SHOWING THAT OFFICIAL ACTION WAS OR WAS NOT TAKEN IS REQUIRED

The indictment in this case was brought under Section 201(c) and Section 201(g) of Title 18 of the United States Code. These provisions punish the crime for a public official to solicit or receive anything of value "in return for * * * being influenced

performance of any official act" (Section 201
official act performed or to
(Section 201(g)(1). The essence of
was that the Speech or Debate
Senator Brewster, constitutionally
prosecution for alleged bribe
App. 33a. This is not a
which to prove its case, the government
legislative activity, for
The government need only
was" in connection with the per
" App. 33a; quoted
Br. 15).
corrupt intent, see, e.g.,
any official act is in fact thereafter
This, the offense could be committed with
Speech or Debate at all; whether the inten
official action occurred because of a
agreement on the part of the public official, or
official action was thwarted by illness, or
the public exposure of the bribe. Regard
breadth of the protection of the Speech
Clause, proof of the offense charged under
could be made without proving any
Debate whatever. All that is required is
tentation or receipt of a bribe, with the
construction of the statute the words
"demands, solicits, seeks" in the statute
application or effectiveness. When a
asks to do an act, and this is brought

to the attention of the proper authorities, it would be odd if they had to wait until he had done the act because they could take official action. If a Senator says to a constituent: "I demand $10,000 if you want me to vote for your bill," and that statement, supported by adequate evidence, is made known to the United States Attorney, a fair construction of the statute is that he can move at once, and that he would not be performing his duty if he replied: "We will watch the Senator, and if he does vote for your bill, then we can proceed against him. In the meantime you had better give him the $10,000, and we will protect you against a charge of paying a bribe. If you do not give him the $10,000, he may not speak and vote for your bill, and then we could never prosecute him."

If this is the proper construction of the solicitation words in the statute, it should likewise be the proper construction of "received" in the same statute, that is, that it applies to the receipt with the requisite intent, regardless of whether any Speech or Debate actually occurs. In any event, the indictment before the Court charges that the defendant "asked, solicited, sought, accepted, received and agreed to receive" a bribe in return for his influence. That offense was complete when the bribe was solicited or received, with the requisite intent, regardless of any proof of actual Speech or Debate. Cf. *United States v. Myerson*, 167 F. 2d 834, 845 846 (C.A. 2).

Moreover, there are many sorts of official actions which may be taken by a Senator which do not amount to Speech or Debate within a proper construction of that Clause in the Constitution. It is true that the

proper limits of the Speech or Debate Clause are not wholly clear as a matter of language, of grammatical construction, or under this Court's decisions. Nevertheless, the words used in the Constitution are "any Speech or Debate in either House." That clearly applies to speeches on the floor, or debates engaged in on the floor of the House or Senate by a member. It is not as clear—verbally, at least—that it applies to votes, though that need not be determined in this case. How far the Speech or Debate clause applies to the gathering of material in preparation for a Speech or Debate, or to staff members engaged in such gathering of material, has not been determined, and need not be determined in this case."

Whatever the eventual results are on such problems, there are surely many actions which a Senator takes which do not amount to Speech or Debate, and do not come within that Clause unless it is to be construed to grant immunity to a Senator for any act he does as a Senator, without regard to whether it can be called Speech or Debate, or has any fair relation to Speech or Debate. He may write a letter to a constituent; he may speak to another Senator in his office or in the corridor or on the telephone; he may call or write to an officer in the Executive Branch of the government to encourage or request that officer to propose certain legislation, or to refrain from proposing it. It seems hard to think that any such actions can fairly or properly be construed to constitute "Speech or Debate in either House," or that those words of the Constitution need be given such a broad construction for the purpose of giving adequate protection to Senators or

Members of the House in the performance of their duties, or against the excessive zeal of the Executive or Judicial branches of the government.

This is made particularly clear when we see that Congress has itself provided legislation which has long been in effect for 109 years making it a crime for a Congressman or Senator to solicit or receive a bribe. It seems unlikely that Congress thought it was violating the Constitution when it passed this statute in 1853, and repeatedly repassed it, and finally re-enacted it in 1962. There is no adequate reason for this Court to decide that Congress did not understand its when it passed this statute. As this Court said in *Burton v. United States*, 202 U.S. 344, 367, a related situation:

> it was never contemplated that the authority of the Senate to admit to a seat in its body one who had been duly elected as a Senator, or its power to expel him after being admitted, should, in any degree, limit or restrict the authority of Congress to enact such statutes, not forbidden by the Constitution, as the public interests required for carrying into effect the powers granted to it.

And, as the Court likewise said in the *Burton* case, *ibid.*, the statute

> can be executed without in any degree impinging upon the rightful authority of the Senate over its members or interfering with the discharge of the legitimate duties of a Senator.

There is no reference in this indictment to any speech or debate in the Senate. This is thus a clear distinction from the situation in *United States v. Johnson*, 383 U.S.

169, where, as this Court observed, the speech was specifically charged as a part of the conspiracy (383 U.S. at 184), and a substantial portion of the trial was devoted to the content of the speech and its authorship (383 U.S. at 173-176).

III

THE STATUTORY HISTORY

The history of the statutory provision was not fully developed in our main brief, and it is summarized here for the possible convenience of the Court.

The original statute relating to bribery of Congressmen or Senators was section 6 of the Act of February 26, 1853, c. 81, 10 Stat. 170, 171. This reads as follows:

> SEC. 6. *And be it further enacted*, That if any person or persons shall, directly or indirectly, give, offer, or promise any money, office, or place of profit or trust, or any other valuable consideration whatever, to any member of the Senate or House of Representatives of the United States, with intent to influence his vote or decision on any question, matter, cause, or proceeding which may then be pending, or may by law, or under the Constitution of the United States, be brought before him in his official capacity, or in his place of trust or profession, and the member, officer, or person who shall in any wise accept or receive the same, or any part thereof, shall be liable to indictment as for a high crime and misdemeanor in any court of the United States having jurisdiction for the trial of crimes and misdemeanors, and shall, upon conviction thereof, be fined not exceeding three times the amount

> so offered, promised, or given, and imprisoned in a penitentiary not exceeding three years; and the person convicted of so accepting or receiving the same, or any part thereof, if an officer or person holding any such place of trust or profit as aforesaid, shall forfeit his office or place; and any person so convicted under this section shall forever be disqualified to hold any office of honor, trust, or profit, under the United States.

This provision was carried forward into two sections of the Revised Statutes. These appear as section 5450 and 5500 of the Revised Statutes (1878 ed.), and read as follows:

> SEC. 5450. Every person who promises, gives, or causes or procures to be promised, offered, or given, any money or other thing of value, or makes or tenders any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of any thing of value, to any member of either House of Congress, either before or after such member has been qualified or has taken his seat, with intent to influence his vote or decision on any question, matter, cause, or proceeding which may be at any time pending in either House of Congress, or before any committee thereof, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made, or tendered, and shall be [illegible] not more than three times [illegible]
>
> SEC. 5500. Any member of either House of Congress who asks, accepts, or receives any money, or any promise, contract, [illegible]

obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, either before or after he has been qualified, or has taken his seat as such member, with intent to have his vote or decision on any question, matter, cause, or proceeding which may be at any time pending in either House, or before any committee thereof, influenced thereby, shall be punished by a fine not more than three times the amount asked, received, or received, and by imprisonment not more than three years.

These provisions of the Revised Statutes were carried forward into Section 110 of the Criminal Code, Act of March 4, 1909, c. 321, 35 Stat. 1088, 1108. Section 110 reads as follows:

> SEC. 110. Whoever, being elected or appointed a Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, directly or indirectly, ask, accept, receive, or agree to receive, any money, property, or other valuable consideration, or any promise, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to him or to any person with his consent, connivance, or concurrence, for his action, vote, or support, or with the intent to have his action, vote, or decision influenced, on any question, matter, cause, or proceeding, which may at any time be pending in either House of Congress or before any committee thereof, or which by law or under the Constitution may be brought be-

> fore him in his official capacity, or in his place as such Member, Delegate, or Resident Commissioner, shall be fined not more than three times the amount asked, accepted, or received, and imprisoned not more than three years; and shall, moreover, forfeit his office or place, and thereafter be forever disqualified from holding any office of honor, trust, or profit under the Government of the United States.

By 1958, this had become 18 U.S.C. 205 (1958 ed.), without any material change of wording.

At about that time, there was extensive consideration by the House Judiciary Committee of all the statutes relating to bribery and conflict of interest, and a suggestion, apparently originating in the House Committee staff, that all of these statutes should be all brought together and consolidated. See Federal Conflict of Interest Legislation, Staff Report to Subcommittee No. 5, House Committee on the Judiciary, 85th Cong., 2d Sess., dated March 1, 1958. Compare Association of the Bar of the City of New York, Conflict of Interest and Federal Service (1960).

The eventual result was the statute involved in this case (which was enacted by the Act of October 23, 1962, Public Law 87-849, 76 Stat. 1119. This repealed sections 201-213 of Title 18 U.S.C. as it then existed and enacted new provisions including section 201 involved in this case. The reports of the two congressional Committees are H. Rep. No. 748, 87th Congress, 1st Session; S. Rep. No. 2213, 87th Congress, 2d Session.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

JEROME M. FEIT,
Assistant to the Solicitor General.

MARCH 1972.